A DISCOURSE ON THE BOOKLAND AND FOLKLAND OF THE SAXONS:

WHEREIN THE NATURE OF THOSE KINDS OF ESTATES IS EXPLAINED;

AND THE NOTION OF THEM ADVANCED BY SIR JOHN DALRYMPLE IN HIS ESSAY ON FEUDAL PROPERTY, EXAMINED AND CONFUTED.

TURNO TEMPUS ERIT, MAGNO CUM OPTAVERIT EMPTUM
INTACTUM PALLANTA. VIRG.

CAMBRIDGE:
Printed by J. ARCHDEACON, Printer to the UNIVERSITY.

M.DCC.LXXV.

ADVERTISEMENT.

AS the doctrine laid down, in a late Eſſay on Feudal Property, concerning Bookland and Folkland, comes from a Writer of ſome eminence, whoſe work has undergone ſeveral editions, and whoſe ſentiments on the matter before us, have not only had the honour of being adopted by a late noble Hiſtorian, one of the fineſt writers of the preſent century*, but are likewiſe, of which

* It ſeems that theſe Liberi Homines were a remainder of the Alodial Tenants of the Saxon Folkland, that is, Land of the Vulgar, oppoſed to Bookland, or Thaneland. Lyttleton's Hiſt. of Hen. II. 2d Edit. Vol. II. p. 251.

which the author does not ſeem to be aware, conſonant to thoſe of a moſt learned Antiquary in the laſt: a ſlight examination of his opinion would be, in ſome degree, a failure in the reſpect due to this great Authority juſt mentioned†; to the noble Lord, who has given into it; to the Public, whoſe countenance the Book containing it has received; and, but for a late publication, in which to uſe the Language of Shakeſpear, "Such peſtiferous reports are made of men very nobly held," we might have added, to the Author himſelf. For theſe reaſons, and to prevent beſides all poſſibility of ſuſpicion, that any thing is concealed, which makes againſt us, it has been thought neceſſary to take into conſideration all the Laws extant,

† Selden in his Analectics, L. 2. c. 5. p. 926. calls the Bocland of the 37th of Alfred, *Feudum Talliatum.*

tant, ſo far as they have come to our knowledge, wherein the terms Bookland and Folkland occur. By doing which, the ſubject may perhaps have been dwelt upon longer, than ſome may think neceſſary for clearing up the difficulties attending it: if this ſhould be the caſe, and things are indeed made too plain, it is a fault, for which we promiſe ourſelves an eaſy pardon from the Reader. And this perhaps will be the more readily granted us, when it is conſidered, that Antiquaries have too frequently erred in the contrary extreme by treating opinions, taken up without ſufficient grounds, as certainties, and occaſioning thereby ſuch a contrariety in them, as rather tends to diſtract, than to inform, the Reader, being no ſmall diſcouragement to him in his inquiry; and at the ſame time,

bringing

bringing diſcredit on the branch of Literature, which is the object of them.

In this little piece therefore, and ſome others of the like kind, which, if this is approved, may perhaps be hereafter offered to the public; endeavours are uſed, ſo far as they go, to remedy this evil, by pointing out the ſlips, which ſeveral eminent writers on the ſubject of Antiquities have made, and attempting to eſtabliſh ſomething on more ſure foundations in their ſtead. Writers of eminence are ſolely mentioned, for it is with theſe only we ſhall be concerned; the errors of others are not contagious: being neither founded in truth, nor ſupported by the reputation of their authors, there is no danger of their ſpreading. It is to the weight of their arguments, that ſuch inferior writers as ourſelves muſt

muſt ſolely truſt: if theſe are found wanting in the ballance, we ſhall in vain hope to gain credit on any other account.

But if, for this reaſon, it is to perſons only of ſome rank in the republic of Letters, that our corrections are to be confined, if we mean to render them uſeful; how dangerous will be the ſtation? how invidious the ſervice? In impugning the opinions of ſuch as theſe, we ſhall have too much reaſon to ſay with the Twickenham Satyriſt, "Trembling I touch them;" and the beſt apology we can make for the boldneſs of an undertaking, entered upon, not through any fooliſh and ill-grounded thoughts of Rivalſhip, but from the love of truth only, will be to allege with Tacitus, which indeed we can moſt truly, that it is done "non in comparationem curæ — ingeniive, ſed

ſed ut quæ priores, nondum comperta, eloquentiâ percoluere, rerum fide tradantur.*

* Tacit. in vita Agricolæ.

A DISCOURSE ON BOOKLAND AND FOLKLAND.

DOES not the learned Author of the Eſſay on Feudal Property bear ſomewhat too hard on the Saxons, who firſt ſettled here, in calling them "a cruel and "extirpating race[a]?" During the long conteſt indeed between them and the ancient inhabitants of the country, there was doubtleſs in thoſe ſavage times, cruelty enough exerciſed on both ſides; but reſiſtance on the part of the conquered being at an end, we find the conquerors behaving afterwards with the ſame moderation in this iſland, as the reſt of the German nations practiſed univerſally in their acquiſitions on the continent. Their method every where was to take only part of the lands in the ſeveral countries for their own uſe, and to leave the natives in

[a] Dalrymple on Feudal Property, 3d Edit. p. 18.

poſſeſſion of the reſt[b]. The lands thus taken into their own hands were converted into Fiefs, but thoſe remaining with the natives were left free and independant of any Lord, being ſubject only to the King, and to him, not in his ſeignoral, but royal, capacity. Thus by a diſpoſition, which at firſt ſight appears very extraordinary, the lands of the conquered were permitted to remain free, alienable, hereditary, open to entails, and bequeathable; while thoſe of the conquerors were held of a ſuperior, either during pleaſure; or for a year; or at moſt, in thoſe early days, for life only.

b Spirit of Laws, B. xxx. Ch. 8. — Cæſar de Bell, Gall. Lib. 1. Cap. 23.

Notwithſtanding all this the Feudaliſts had in the times we are ſpeaking of great advantages over the Freemen, theſe laſt being looked upon as no better than Boors and Peaſants, incapable of entering into the order of nobility, or of having any ſhare in the Legiſlature. When firſt ſubdued, it is not likely that the conquerors intruſted them with arms; but in aftertimes they were obliged to go out to war under the Alderman or Earl, and his officers[c], on pain of forfeiting both their lives and lands if they fled from the ſervice;

c Sp. of Laws, B. xxx. Ch. 17.

vice[d]; beſides which we read of a Cenſus or Tax levied upon them[e]; but this perhaps was paid in the time of peace only, and remitted when they were in actual ſervice.

d Law 75 Cnute.

e In Doomſday frequently.

Of the contempt in which theſe people were held a remarkable inſtance occurs in the eleventh Law of Alfred, which, treating of the puniſhments for certain rudeneſſes offered to the fair-ſex, calls the woman nobly born *Wifman*, a word Saxon and of Saxon origin, but looked upon as too honourable an appellation for the daughter of a Freeman or Ceorl, who is therefore ſtiled *Fœmne*, a word ſignifying indeed woman as well as the other, but choſen purpoſely, in this caſe, from the language of the conquered Romans, to denote that her extraction was no better than that of the name by which ſhe was called.

Nor was this contempt of the Freeman without its conſequences: their eſtates were liable to be wreſted from them by their overbearing neighbours, and their perſons to inſults[f]; their oaths, their property, and even their lives were of leſs eſteem in the law than thoſe of moſt other men.

f 31 Alfred. Spirit of Laws, B. xxxi. Ch. 8. Saxon Laws Paſſim. Athelſtan's Laws, Wilkins p. 64. Ib. p. 72.

To dwell on the diſadvantages, under which this order of men laboured, in reſpect to theſe three laſt particulars, would take us too long from our ſubject, and beſides they are pretty well known; ſpeaking therefore, only of the Inſults to which they were expoſed, theſe may be, in ſome meaſure, learnt from the Laws made to prevent them: by the 31ſt of Alfred, for binding a Freeman, who had committed no offence, the penalty was ten ſhillings; for ſcourging him, twenty ſhillings; for putting him into the cage, in which ſlaves were expoſed to ſale, thirty ſhillings; for cutting off his hair in deriſion, as was done to ideots, ten ſhillings; for ſhaving his head with the prieſtly tonſure without binding him, thirty ſhillings; for withal cutting off his beard, twenty ſhillings more; for binding, and then ſhaving him for a prieſt, ſixty ſhillings.

By the three firſt of theſe inſults the Freeman was treated as a ſlave; by the fourth as an ideot; by the three laſt as a coward; but by the laſt of all as a ſlave as well as coward.

From the Saxon cuſtom of keeping the hair of an ideot ſhorn, and the occaſion which

which this muſt have given for his wearing ſome other covering on the head, probably comes the proverbial ſaying, That perſons, who ſmart for their folly, are CUT *for the Simples*, and the modern notion of a *Fool's Cap*.

Under ſuch circumſtances as we have been mentioning it is not to be wondered at, if, notwithſtanding their lands were free, many of the freemen gladly converted them into Fiefs ſo ſoon as it was in their power. This privilege, however, they ſcarcely obtained 'till many ages after the Saxons became their maſters. It was not granted to the Freemen in France before the year 847[g], and, as that nation generally in thoſe times gave the lead to this in Feudal affairs, it was probably ſomewhat later before it took place here.

g Spirit of Laws, B. xxxi. Ch. 24. from Baluzius, Tom. II. p. 44.

Let us obſerve further, That, if the Freemen were glad to commence Feudaliſts, ſo on the other hand the holders of the feudal lands, being ſecured by the poſſeſſion of theſe in the enjoyment of the Privileges annexed to Fiefs, were no leſs pleaſed in acquiring Free Eſtates, the only ones which they could properly call their own; hence in the later times of the Saxon

period it is common to find one and the ſame man poſſeſſed of both theſe kinds of Land, which in the Saxon Law are diſtinguiſhed by the names of Bocland and Folcland, and in the Doomſday record, if our learned author is right, by thoſe of Thaneland and Reveland.

About theſe latter terms it is difficult to form any diſpute; but the obſcurity of the two former has given riſe to various opinions concerning them; and among the reſt to one advanced in a late Eſſay on Feudal Property, which the Author acknowledges to be "different from the accounts given by modern Hiſtorians, Lawyers, and Antiquarians"; and yet appeals boldly for the truth of it "to the nature of the German conqueſts, the analogy of law in neighbouring nations at the time; and to a general view of the Saxon Laws themſelves". If the determination of the cauſe is left to theſe, it will be certainly before it's proper judges; for which reaſon we ſhall look into each of them, and ſee how far they make for or againſt him.

We muſt, however, firſt ſpeak of the diſtinction between Bocland and Folcland,

land, as laid down by this Author, and, that we may be ſure not to miſrepreſent him, ſhall chooſe to do it in his own words; "Land, he ſays, granted to the Thains or Lords was called Thain Land; Allodial Land, over which the King's Officer, called in the Saxon language, Reve, and afterwards Sheriff, had juriſdiction, was called Reve Land. Again, Land of the one kind, being held by a Charter, was at other times called Bocland, that is, Bookland; Land of the other kind being held without writing, and in the ancient manner, and moſtly by the ancient inhabitants was called Folkland[h]."

[h] Dalrymple on Feudal Property, 3d Ed. p. 12.

Thus ſtands our Author's opinion, and we are now to examine it under the three heads of his appeal; in doing which, as leſs, we think, is to be learnt from the ſecond, where it is conſidered diſtinctly from the other two, than from either of them, we ſhall begin with that; thinking it beſt in an inquiry of this kind to grow clearer as we make a farther progreſs, and to keep advancing gradually from darkneſs to daylight.

Touching then the Analogy of Law in neighbouring nations at the time, when viewed

viewed thus ſingly, we fear it will help us but little. From the ancient laws indeed of France, and other countries conquered by the Germans, much may be gathered for the better underſtanding of our Saxon Laws in the general, and more particularly thoſe parts of them which relate to the lands held by the Feudal Tenants, and the Freemen; but in regard to the queſtion before us, to which, namely, of theſe lands reſpectively, the terms Bocland and Folcland are to be referred, no direct information can be had from foreign nations, as they no where occur, at leaſt that we can find, in any of the Laws of the continent.

Leaving then this Analogy for the preſent to be reſumed again occaſionally[1], let us next conſider the nature of the German Conqueſts, of which we have already ſpoken, ſo far as relates to the moderation uſed in them, and the diviſion of the Lands between the Conquerors and the Natives; the only thing, we think, to be obſerved further is the total want of Literature

[1] It will be ſpoken of again under this very head of German Conqueſts, and in our obſervations on the 37th Law of Alfred, and in the Poſtſcript.

Literature amongſt the Germans[k] in their mother country, and their acquiſition of it from the nations which they conquered[l]. This circumſtance merits our attention; for, if it does not entirely deſtroy the opinion of our Author, it certainly renders it highly improbable. The Feudaliſt, that is the German, or, as we may call him in reſpect to this nation, the Saxon, learns Letters of the conquered Freemen; and yet is the firſt, who according to our Author, aſſumes the uſe of writing for the ſecurity of landed Titles. But is there any thing in the practice of ancient or modern times to countenance ſuch an opinion? to judge from analogy, as kingdoms were anciently conferred by delivery

[k] Literarum ſecreta viri pariter ac fœminæ ignorant. Tacitus de Morib. German.

Among the Franks, during their firſt ſettlement "there were hardly any but Romans that knew how to write." Sp. of Laws, B. xxviii. ch. 3. Note. See likewiſe ch. 11. of the ſame Book; and the caſe was pretty much the ſame here: Wihtred King of Kent, notwithſtanding one ſet of the Saxon Laws goes under his name, on ſigning a Charter with a Croſs, makes no ſcruple of acknowledging that he does ſo, "pro ignorantia literarum." Spelman's Councils, Tom. I. p. 193 and 198.

[l] Thus it had been before with reſpect to Greece and Rome:

"Græcia capta ferum victorem cepit, et Artes
"Intulit agreſti Latio. Horat.

delivery of a ſword or ſceptre, and Provinces by a banner[m], the natural concluſion is, that Fiefs were likewiſe granted by the ſame kind of ſymbolical conveyance. And in fact, "the moſt ancient grants in Britain, as well as other countries, were given by the ſuperior himſelf in preſence of the Pares Curiæ, on the land itſelf, without writing," as the author of the Eſſay on Feudal Property himſelf acknowledges.

m Selden's Tit. of Honour, p. 29. 1ſt Edit.

Nor are the Charters of Feudal Lands granted to Monaſteries, during the Saxon period, an objection to this ſtate of things in that time; for, as Monteſquieu excellently well obſerves, "the Patrimony of the ſeveral churches having been formed by particular grants, and by a kind of exception to the order eſtabliſhed, they were obliged to have charters granted to them; whereas the conceſſions made to the Feudal Lords, being conſequences of the political order, they had no occaſion for a particular Charter[n]."

n Sp. of Laws, B. xxx. Ch. 22. 4th Edit. p. 427

At the firſt entrance of the Normans the caſe continued the ſame; many eſtates were conferred by the bare word of the Lord, or by his ſword, helmet, ſpur, bow,

bow, arrow, and the like ſymbols; but charters began ſoon to be more in uſe here, and from hence found their way into Scotland, where they were firſt employed in Feudal Grants, as all the Scotch Antiquaries agree°; by Malcolm Canmore, who was cotemporary with our William the Firſt; and yet amongſt us even at this day Copyhold and Cuſtomary Lands, which retain more of the Feudal nature than any others, paſs from an old tenant back to the Lord, and from him to a new tenant by the ſymbol of a wand or rod, without any writing, excepting what is entered on the Manor Rolls, for a memorial of the tranſaction, and copied from thence for the uſe of the Tenant. All theſe things conſidered, if Feudal Eſtates were indeed called Book, or Charter Lands, in the Saxon times, we muſt be greatly at loſs for the reaſon of it.

To come now to the Saxon Laws themſelves, thoſe ſureſt guides, as our Author juſtly ſtiles them, in the queſtion.

Law II. Edward the Elder:

"We

° Dugd. Warwickſ. p. 138. from Ingulph, who was ſecretary to the Conqueror. Home's Brit. Antiq. p. 18. Ed. 2.

" We likewiſe ſay what he is worthy of, who invades the rights of another either on Bocland or Folcland, when the cauſe is brought before the Sheriff; if he then has no right neither on Bocland nor Folcland, that he ſhall be guilty with the King thirty ſhillings, the fine due for ſuch invaſion; for a ſecond offence, the like; and for the third, the fine due from one who ſtands in contempt of the King, that is, one hundred and twenty ſhillings; unleſs he deſiſts before."

This, I think, is the only Law, in which the term Folcland occurs; it is put, we ſee, in oppoſition to Bocland, and under one or the other of theſe terms, together with that of Biſhops Land, all the lands in the kingdom ſeem to have been comprehended; but nothing is ſaid, by which we can judge of the nature of either. Bocland is mentioned more frequently in diverſe Laws, all which ſhall be produced, and a proper explanation of them, will, it is hoped, enable us to fix the meaning both of it and Folcland with certainty.

Law XXXVII. Alfred:

" If a man has Bocland, left him by his anceſtors, we decree he muſt not grant it

it from his relations, if there is either writing or evidence, that the perſon, who firſt acquired and left it to him, forbad his doing ſo, and made a declaration to this effect, atteſted by the King and Biſhop[p], before his relations."

From this Law three obſervations ariſe.

The firſt is, That we ſee the Land was hereditary, and, as it ſhould ſeem from the Law, indefinitely ſo. Now the Feudal Cuſtoms, as we have already obſerved, were derived hither from the Continent: but the general Law, by which Fiefs deſcended to the *Children*, in France, was not until under Charles the Bald, in the year 877[q]; and Otho the Great was the firſt in Germany, who beſtowed his territories in Feudal right of inheritance[r]; which right, however,

q Sp. of Laws, B. xxxi. Ch. 27. Edit. 4. p. 502. from Baluzius, Tom. II. p. 263.

r Selden's Tit. of Hon. p. 191. 1ſt Edit.

p That is in the Shire Gemot, which was held twice in the year before the Biſhop of the Dioceſe, and the King's Officer, the Alderman or Earl of the County for all cauſes both Eccleſiaſtical and Civil, See the 5th of Edgar's Polit. Laws, and Capit. Benedict. Levita, B. vi. cap. 212. Baluzius 1ſt Edit. Tom. I. p. 960. of which laſt, as the Book is not in every body's hands, I ſhall give a copy, to ſhew how ſimilar the proceedings here in theſe caſes were to thoſe on the Continent: "Qui filios non habuerit, et alium quemlibet heredem ſibi facere voluerit, coram Rege, vel coram Comite et ſcabinis, vel miſſis Dominicis, qui ab eo ad juſtitias faciendas in provincia fuerint ordinati, traditionem faciat.

however, extended only to the *Children*; his ſucceſſor Conrade, who began his reign in 912, was the firſt who granted the deſcent to *Grandchildren*[s]. It is therefore very unlikely that Fiefs were in any degree deſcendible here ſo early as the reign of Alfred, who died in the year 901, and much leſs that they were ſo indefinitely.

s Sp. of Laws, ch. 29. B. xxxi. p. 505.

Here then we find that Analogy of Law in neighbouring nations at the time, to which our Author appeals ſo boldly, making as ſtrongly againſt him, as any thing of the kind can well do.

With ſome appellants to Analogy, an objection of this kind would at leaſt have been weighty, if it had not carried conviction; but our learned advocate was both aware of, and deſpiſed it. What if "the Feudal Syſtem, ſlow and regular in it's movements, was not to be whirled about in ſubſerviency to Mountford's exigencies[t]," might it not be put out of it's ordinary courſe and made to move a little quicker, when urged on by the hand of an able Lawyer? Our Author's Hiſtory of Succeſſion will anſwer this queſtion: he there tells us, how truely ſhall be conſidered hereafter, that "it is certain the Booklands,"

t Dalrymple's Hiſt. of Parliament, in his Eſſay on Feud. Property, 3d Ed. p. 334.

Booklands," meaning thereby the Feudal Lands, "went, in general, to the Heirs of the immediate Crown-vaſſals, among the Saxons, more early than in any other ſtate in Europe[u]."

[u] Dalrymple's Hiſt. of Succeſſion, p. 201.

Our ſecond obſervation is, That the Lands of this Law were entailable; but Entails of Feudal Eſtates, to ſpeak from ſuch authority, as we are ſure our learned Advocate will not call in queſtion[x], did not come into uſe until after the Conqueſt in the days of Edward the Firſt; they muſt not then be looked for in the reign of Alfred, but among the Freelands only.

[x] Dalrymple of Feudal Property, Ch. 4. p. 164. Edit. 3.

In the third place we have to take notice, that, if the Land here ſpoken of was Feudal, it is much that nothing is ſaid of the conditions by which it was held. For theſe, as appears from the two foregoing obſervations, muſt have been very unuſual if not unprecedented, and therefore the caſe being thus extraordinary, it ſeems not ſufficient to mention only the firſt acquirers Entail; the Law ſhould have gone further, and ſhewn his authority for making one.

Before this Law of Alfred is wholly diſmiſſed, we muſt take notice of another,

which is partly taken from it, and, though not Saxon, is yet nearly of the Saxon times.

L. 70. Henry I. " The Father's principal Fief ſhall go to his eldeſt Son; the purchaſes and acquiſitions afterwards he ſhall beſtow on whom he pleaſes; if he has any Bookland, which his parents gave him, he muſt not paſs that from his relations."

This Law, after ſeveral other proviſions, ſettles the Rules of Deſcent where a perſon dies without iſſue, to which, is ſubjoined the part inſerted here, wherein the power of a Father in granting his eſtates by will is defined.

The eſtates enumerated or implied in it are of four kinds; the firſt, Fiefs derived to him from an Anceſtor: the ſecond, Fiefs which he had acquired by Purchaſe or otherwiſe: the third, Booklands derived to him from an Anceſtor: and the fourth, Booklands which he had acquired by Purchaſe or otherwiſe. The firſt kind were not deviſeable; the eldeſt ſon was to have the principal paternal Fief; the other paternal Fiefs, of which nothing is ſaid, were left to go as the common law directed.

ed. With the ſecond and fourth kinds of eſtates the Teſtator might do as he pleaſed; but the third was not to be granted away from his Family.

If therefore we have interpreted this Law aright, Fiefs and Booklands are manifeſtly diſtinct[y].

Law I. and II. of Æthelſtan, in the Judicia Civitatis Lundoniæ.

Law I. "This is then firſt, that no thief be ſpared over twelve pence, if a twelve winter-man[z], but legally tried, and if

[y] If our Author had been ſufficiently apprized of this diſtinction, he might have avoided ſome confuſion, which is at preſent to be found in his Hiſtory of Alienation, from his miſunderſtanding this Law of Henry I. and the foregoing one of Alfred. See Feud. Prop. p. 95, and 97. 3d Edit.

[z] That is, a perſon guilty of Theft to the value twelve pence, and twelve years of age

In the reign of Ine, a Boy might be convicted, as an accomplice with his Father, in Theft, at ten years of age. By a Law paſſed earlier in this Prince's (Æthelſtan's) reign, the value which rendered a Theft capital, was not more than eight pence, and the age twelve; as this laſt ſtill remained, when the Laws now before us were enacted; but it ſhocked this worthy grandſon of Alfred, as he told a later Aſſembly of his States at Witlanbury, to take away the lives of perſons ſo young, and for ſo ſmall a ſum as was every where done; upon which it was decreed to extend the life to fifteen years, and the Law then lately paſſed for raiſing the value of the goods ſtolen to twelve pence was likewiſe confirmed. Poliſhed as the preſent times are, our Laws, in theſe two reſpects, are leſs humane than they were under Æthelſtan, a minor on a criminal

if guilty, and unable to clear himſelf, executed. And let all which he hath be ſeized, and firſt the Ceapgyld[a], and let the remainder be divided into two parts, one for his wife[b], if innocent, and not privy to

minal proſecution is now puniſhable at fourteen years of age, and twelve pence ſtill ſuffice to render the crime capital, though twelve pence then contained thrice the weight in ſilver which they do now, and, conſidering the low prices which things then bore, may, upon a very moderate eſtimate, be reckoned equal to thirty ſhillings of the preſent times. See the prices of ſeveral kinds of cattle in Æthelſtan's reign, Wilkins's Sax. Laws, p. 66. cap. 6.

[a] Ceapgyld, that is, the ſum levied on the effects of a convict, to indemnify the perſon robbed for his ſtolen goods.

As our Laws ſtand at preſent, the identical money or goods ſtolen, after conviction of the criminals are in ſome caſes to be reſtored to the right owner; but, ſuppoſing theſe to be gone, or waſted, there is no proviſion, that I know of, by which ſuch an indemnification is to be made to the perſon robbed, as this of Ceapgyld; and yet it is not always penury which brings men to thieving; avarice will ſometimes do it; of which we had lately a remarkable inſtance in a perſon of conſiderable property. In this particular therefore, as well as thoſe above-mentioned, the Laws of our Saxon Anceſtors, ſeem to be ſuperior to thoſe of the preſent times.

[b] Somner, in his Treatiſe on the Writ De Rationabili parte bonorum, ſays, "There was not any certain or definite part of the deceaſed's goods, by any cuſtom here nationally obſerved, due to the Widow or Children in the Saxon times by any Law, or monument of theirs, which he could find." In the caſe of a Widow or Children, the Diviſion by that writ was tripartite; after diſcharging the debts of the deceaſed Huſband, the Widow had one third, the Children another, and the laſt, called the Death's part, was conſidered as belonging to the deceaſed, to be diſpoſed

to the crime, and the other to be again divided into two parts, one half for the King, and the other half for the Tythingman."

Law II. "If it is Bookland or Biſhop's land, then let the Landlord have one half in common with the Tything."

The Title and Preface of theſe Laws, lead us, at firſt ſight, to think they were only intended for the City of London, and had no higher ſanction than the Biſhop and Portreve gave them; but upon examining them further, it is evident they are a collection of the Laws paſſed in the Wittenagemotes held under Æthelſtan at Greatanlea, Exeter, Feverſham, Thunresfield, and Witlanbury, and all which the Biſhop

diſpoſed of by himſelf, as he ſhould ſee good by his Will, or, if he died inteſtate, by the Ordinary for the good of his ſoul: if he left a Widow and no Children, or Children only and no Widow, the diviſion was bipartite; one moiety to the Widow or Children, as the caſe ſhould be, and the other to the uſe of the deceaſed, as before. Now it is ſubmitted to the Reader's conſideration, whether the latter of theſe caſes is not the ground-work, on which the Diviſion made of the Thief's effects, in the two Laws before us, was built, where the ceapgyld, or ſatisfaction given to the perſon robbed, anſwers to the payment of the deceaſed's debts, the Wife has her moiety, and the King or Landlord, (as it ſhall happen,) and the Tything, ſhare the Death's part between them.

Biſhop and Portreve did, was in purſuance of the tenth Law, which enjoined every Sheriff to take ſecurity from the perſons in his ſhire for their obſervance of the Laws enacted at thoſe places.

From the two Laws taken together, and the exceptions in the ſecond in favour of the Landlord, it ſeems evident that the fourth part of the perſonal eſtate belonged to the King, only in the caſes where the Thief had no land, or the King himſelf was the Landlord. Now the land of the thief, if he had any, under the firſt Law muſt have been Folkland, for it's oppoſite, Bookland, we ſee, is a part of the land excepted in the ſecond. Folkland then belonged to the King, and Bookland not; or, in other words, by the Folkland implied, though not expreſſed in the firſt Law, is to be underſtood Feudal-land, all which was held immediately or mediately of the King, and by the Bookland mentioned under the ſecond Law, we are to underſtand Free-land, of which, though our Author in one place[c], where it makes for his purpoſe, ſays, it was "deemed to belong to the King," yet in another[d], where this bias does not draw him, he deſcribes it's

[c] Eſſay on Feud. Prop. p. 25. 3d Ed.

[d] Ib. p. 13.

its owners as "having no attachment to the King in a ſeignoral, but alone in a political capacity."

The Biſhop's land is excepted, becauſe, being chiefly Feudal, it would otherwiſe have been included in the firſt Law, contrary to the privileges granted to that order, which, during the Saxon period, were very great, and, as the terms of the ſecond Law inform us, cauſed them, from their being bound to no ſecular ſervices, to be conſidered as free Landlords though holding of the King.

Law I. and II. Edgar.

Law I. "We ſay then firſt, That God's Church is worthy of it's dues, and all kinds of Tythe ſhall be fully paid to the Mother-church of the Pariſh in which the lands of any perſon are ſituated, and this ſhall be done as well from a Thane's Inland as from his Neatland."

Law II. "If then a Thane hath a Church with a Buryal-place belonging to it, ſituated on his Bookland, let him endow his Church with one third of his Tythe *of ſuch Bookland*; but if his Church is without a Buryal-place, then let him give his Prieſt what he pleaſes out of the

other nine parts *of his Bookland,* and let the whole of the Church-dues go to the Mother-church from all the Free-land.

As theſe Laws mutually illuſtrate each other, we have thought it beſt to inſert them both, but have made ſome little additions, diſtinguiſhed by italics, to the ſecond Law, the better to expreſs the ſenſe in which we underſtand it.

The firſt Law, after enjoining the payment of all Church-dues in the general, deſcends to thoſe due from Thane Land, which, it ſays, ſhall be paid to the Mother-church from the Inlands, or Demeſne Lands, of the Thane, as well as from thoſe granted out to his Tenants; and this is done to guard againſt two practices, which in thoſe times were frequent: in the firſt place, a notion then prevailed that Tythes might be paid to whatever Church a man was pleaſed to frequent, without any regard to that of his own Pariſh[c]; and in the ſecond place, the Lords of Manors,

[c] Lib. Leg. Eccleſiaſt. cap. 14. Ed. Wilk. p. 180. Let no Maſs-Prieſt entice any man from his own Pariſh-church to his Church, nor teach any man to leave his Pariſh-Prieſt and reſort to his Church, and pay his Tythes and the other Dues to him, which he ought to pay to the other.

nors, probably to make themſelves ſome amends for their expence in building and endowing Churches, reſerved often, I believe we might ſay generally, to themſelves the half, or two-thirds of the Tythes ariſing from the Lands in their own hands. This appears from the multitude of Grants made in after-times to Monaſteries, wherein the Tythes of Demeſne Lands thus reſerved from the parochial clergy are made over to thoſe Houſes[f].

The ſecond Law treats of Bookland, and contains an exception to the general rule of Church Dues mentioned at the beginning of the firſt Law. In one particular caſe here ſpecified[g], a third of the Tythe of ſuch Bookland might be taken from the Mother-Church, and annexed to one newly erected; but in all other caſes the whole of the Church dues from all the Freeland, was to be paid to the ancient Pariſh-Church. Freeland then, and Bookland muſt be ſynonyms according to this interpretation

[f] In the original regiſter of one ſmall Priory, are Grants for no fewer than eight Manors of two-thirds of the Demeſne Tythes in each of them.

[g] That is, where the Church had a Buryal-place.

interpretation of the Law, and it will not, we think, be eaſy to put a different conſtruction upon it.

This ſecond Law is adopted by Cnute, and makes the eleventh of his Eccleſiaſtical Laws; it is preceded and followed by divers others, ſpecifying the ſeveral kinds of Church Dues, the times when they are to be paid, and the penalties in caſe of non-payment, but nothing further is to be gathered from them, touching the point in queſtion, than has been learnt from the above-mentioned Laws of Edgar, for which reaſon we ſhall ſay no more of them.

But before we go further on with our ſubject, if the Reader will pardon a little digreſſion, we ſhall beg leave to ſubmit to his conſideration, ſome thoughts which the above-mentioned requiſite of a Buryal-place have ſuggeſted to us.

By the 5th of Alfred, Churches conſecrated by the Biſhop, had the privilege of ſanctuary; by this Law of Edgar, Churches having *a Buryal-place*, might be endowed with Tythes; in both Laws it is meant to diſcourage the erecting of Churches, without the conſent of the

the Dioceſan; for, as no man in thoſe days would, for any conſideration, be buried in unhallowed ground[h]; wherever there was a Buryal-place, there muſt likewiſe have been a Conſecration, and, as this could only be performed by the Biſhop, his concurrence was as requiſite to the Churches of Edgar's Law, as to thoſe of Alfred's.

By the Laws of Howel Dha, a Church built in a village with the King's leave, and having Maſs celebrated in it[i], and *a Buryal-place*, entitled the inhabitants of the village to their freedom.

Theſe two inſtances make it likely, that in a third, inſerted at the end of the Judicia Civitatis Lundoniæ, the Church, which, by an old Law, made part of a Ceorl, or Freeman's title to the rights of a Thane, was not to be without it's *Buryal-place*; yet nothing of this occurs in the text, as it ſtands at preſent, all the requiſites mentioned in it, beſides five Hydes of Freeland, being a Church and a

[h] Canons under Edgar 15. 18. 21. 45. North. Preſb. Leg. 62, 63.

[i] Edg. Can. 31. forbids the celebrating of Maſs any where but on a conſecrated Altar.

a Kitchen, a Bell Houſe and Burgh Gate, a Seat and diſtinct office in the King's Hall; or, as it is in the Saxon, Cynican and Kycenan, Bell Hus ⁊ Burgeat, ſetl ⁊ ſunder Note on Cyninges Healle.

In this extract, inſtead of copying Wilkins's miſtake, who points and tranſlates the paſſage, as if the ſetl was a part of the Burghgeat, we have followed the pointing uſed by the learned Selden, in the firſt edition of his Titles of Honour, p. 268; which, if the late ingenious Mr. Clarke of Chicheſter had ſeen, he would not, in his Treatiſe on Saxon Coins, p. 445. n. z. have charged ſo great a man with want of accuracy for an error of the Preſs in a ſubſequent edition.

Mr. Clarke's interpretation of this Law ſeems to be the beſt, which can be given, ſuppoſing the preſent reading to be retained: the Kitchen, the Bell Houſe, and Burgh Gate, point out, as he thinks and expreſſes himſelf, an inelegant Hoſpitality; but, if this was the meaning of the Legiſlature, they ſurely might have found a better way of letting us into it. Yet it is to be obſerved, that ſo far is this Law from having paſſed through careleſs or unſkilful

ſkilful hands, that neither Art nor Elegance are wanting in it's compoſition: the ſix requiſites above recited are divided into couplets, and it ſeems to be intended, that not only the initial Letters of the two members of each couplet ſhould be the ſame, or at leaſt of the like power, but that the variation likewiſe of the vowels, in the firſt ſyllable of the ſecond member in each couplet from thoſe in the like parts of the firſt, ſhould be through all of them, if not literally the ſame, yet the ſame in ſound.

But this end is not completely anſwered, as the text at preſent ſtands; for which, and all the other reaſons given above, we could wiſh, if any manuſcript would bear us out, to ſubſtitue Kyncton, the Saxon word for a Church-yard, inſtead of the unmeaning Kycenan, for this being done, every difficulty vaniſhes; the contraſt in the ſeveral couplets is perfect, and this new reading ſerving to keep us in the right track, inſtead of leading us from it, the Bell Houſe and Burgh Gate which follow, will no longer be ſuppoſed to make parts of the Freeman's dwelling-houſe, but of his Church; which by theſe means

means becomes ſuch an edifice, as might very well help to entitle it's Builder to the rights of a Thane, the conſent of the Dioceſan having been firſt obtained for it's erection, and it being properly accompanied with a yard for Buryal, a Steeple furniſhed with one or more Bells, and a Porch. Where theſe particulars were neceſſary to render a Ceorl a Gentleman, we may be ſure that few Churches built on the Freemen's eſtates would be without them; but, unleſs a proviſion of this kind was made, ſome Freemen, it is natural to ſuppoſe, would erect their Churches in a ſordid and penurious manner, and yet flatter themſelves, that a Building deſtined for divine ſervice, how ſcantily ſo ever it was executed, would ſtill be ſufficient for obtaining them the privileges they aſpired after. The reading therefore here offered, and interpretation conſequent upon it, have this further to recommend them, that they obviate this practice.

Notwithſtanding all theſe advantages, it would undoubtedly be too much to give this reading a place in the text without better authority; and yet, if the reader will be at the pains of doing it, he will find it

eaſy

eaſy to deface ſome parts of the word Kyncton in ſuch a manner, that ſuppoſing a Manuſcript to have ſuffered in the like way, a hungry clerk, more intent on his dinner than devotions, might readily enough fancy the word, when entire, to have been Kycenan, and write it accordingly.

Some of our readers, who have no high opinion of Saxon compoſitions, may perhaps imagine the alliterations in this Law to have been caſual; this was however, a mode of ſpeech much affected by the Saxons, as appears from many inſtances of this kind, which occur frequently in their Laws.

To return now to our proper ſubject.

Law I. and II. Ethelred.

Here again we muſt take two Laws into our view together; for contrary to the uſual method of the Saxons, who generally prefix a diſtinct title to each Law, theſe have only one in common, which ſhews them to have relation to each other.

The former is too long to be inſerted whole, and beſides, no light would be derived from it to the matter in hand, if it was done, for which reaſon we ſhall only

give

give extracts from it, ſo far as relates to the queſtion before us.

Law I. "Every Freeman ſhall have faithful ſureties for his good behaviour—if he is accuſed and found guilty to a degree requiring it, the price of his head muſt be paid to his Lord—in caſe of a ſecond offence, and his flight thereupon, his ſureties muſt ſatisfy the Lord for his head—but if the Lord is accuſed of having adviſed him to flee, he muſt purge himſelf by his own oath, and thoſe of five other Thanes, and if he is acquitted, the fugitive's Head-money then belongs to him, but if he is not, the King has it."

Law II. "And all fines whatſoever ſhall belong to the King, which the man incurs who has Bookland, and no ſuch man ſhall make recompence for any accuſation, but in the court of the King's Reve[k]."

k That is, in the County Court.

In theſe Laws, or I much miſtake them, two kinds of Freemen are pointed out to us, the firſt ſuch as, by putting themſelves under the protection of ſome Lord, had converted their Allodial eſtates into Fiefs, the other, treated of in the ſecond Law, ſuch as continued ſtill to be Allodialiſts. Nor can we be accuſed of begging

ging the queſtion in this caſe; the fines, for offences committed by the perſons mentioned in the former Law, belonging all to the Lord, unleſs he forfeited; while thoſe ariſing from the owners of Bookland were the ſole property of the King, and were to be accounted for to his Reve: Bookland therefore and Reveland are the ſame even on the principles of the author to whom we are oppoſed, for he ſays[1], and backs his aſſertion by references to Monteſquieu, and other great authorities, that "the right to the Fines of the Court was, in all nations of Feudal origin, the ſure teſt of having or not having a proper Juriſdiction."

[1] Dalrymple's Feud. Prop. 3d Edit. p. 282, from Monteſq. Sp. of Laws, B. xxx. ch. 20.

Law XII. of Cnute's Political Laws.

"This is the Right which the King has over all men in Weſt Saxony, that is, the breach of the Peace, and of the Privileges belonging to the Houſe, Foreſtalling, the harbouring a Fugitive, and the Fine for not going out to war, excepting where the King's indulgence extends further, and He grants away theſe dignities. And if a man commits a crime, for which he is liable to outlawry, let the compoſition for it belong to the King, and if he has Bookland

let

let that be forfeited into the King's hands, whatſoever Man's man he happens to be.

This Law, it is to be obſerved, extends to all men, as well Feudaliſts as Freemen; but with regard to the five firſt crimes, there is an exception in favor of the Regalities and other privileged Territories. In the laſt caſe the right of the Crown prevails againſt any immunities, and if the delinquent has Bookland, that is forfeited to the King whereſoever it lies, and whatſoever privileges the Lord may enjoy under whom he may happen likewiſe to hold a feudal eſtate. Touching the Feudal Land the Law ſays nothing; that of courſe by the common or unwritten Law reverted to the Lord who granted it.

We are almoſt aſhamed to beſtow any comment upon a Law ſo plain as this is without one; if there is any other meaning in it, contrary to that here offered, we leave the ingenious Author of the Eſſay on Feudal Property to find it out.

But before he attempts this, he will do well to reconſider another of Cnute's Laws, which is now coming under our view, and is, we think, deciſive in the caſe. It is the 75th of that Prince, the former part

of

of which, in the tranſlation uſed by this author, ſtands thus:

"Qui fugiet a Domino ſuo vel ſocio, pro timiditate, in expeditione navali vel terreſtri, perdat omne quod ſuum eſt, et ſuam ipſius vitam; et manus mittat Dominus ad terram quam ei dederat; et ſi terram hereditariam habeat, ipſa in manum Regis tranſeat."

The uſe, which our Author propoſes to make of this Law, is to ſhew that rear fiefs before the conqueſt were not deſcendible. "Among the Saxons, he ſays, there is not the leaſt reaſon to believe, that the Grants under the Lords were at all hereditary—even the Law of Forfeiture of King Canute—ſo much talked of among Lawyers, proves beyond contradiction, that the Grants under the Lords were not hereditary."

Then, after making this quotation, as we have given it above, he obſerves upon it, that "an oppoſition is put betwixt Land falling to the Lord, and Land falling to the King upon Forfeiture: the laſt is called Terra hereditaria, as ſet in oppoſition to the other, for a very good reaſon, becauſe

the poſſeſſion of Land under a Lord was not hereditary at all[m]:

m Eſſay on Feud. Prop. 3d Edit. P. 17.

Our Author in this, and ſome other parts of his work aſpires to a higher character than that of a mere Compiler, but ſcarcely ever aſſumes the part of an original Writer, without giving us room to wiſh, that he had been contented in a lower ſtation. On ſuch occaſions Imagination ſets off with him, for the moſt part, ſo briſkly, that it leaves another faculty quite behind, makes it extremely dangerous for the reader to follow him, and brings the writer into ſituations from which it is not eaſy for him to extricate himſelf.

Thus, to inſtance in the matter before us: ſhould ſome one, who differs from him, frame an Argument in oppoſition to his, almoſt in his own words, and ending as his does, preciſely in the ſame terms with which it began, what anſwer would he have us to return to it?

"Among the Saxons, it might be ſaid, there is good reaſon to believe, that the Grants under the Lords did in time become hereditary, even the Law of Forfeiture of King Canute, and afterwards of

Edward the Confeſſor, ſo much talked of among Lawyers, proves beyond all contradiction that the Grants under the Lords were hereditary.

Qui fugiet a Domino ſuo, vel ſocio, pro timiditate in expeditione navali, vel terreſtri, perdat omne quod ſuum eſt, et ſuam ipſius vitam; ET MANUS MITTAT DOMINUS AD TERRAM QUAM EI DEDERAT."—Here the Law, after ſaying that the Criminal, who is the object of it, ſhall loſe all which he has, and his Life, adds a direction for the Lord to reſume into his own hands the Lands, held by Grant from him, which is done "for a very good reaſon," to prevent thoſe Lands from deſcending to the Heir of the Criminal, as they would of courſe have done otherwiſe at his death, "becauſe the poſſeſſion of Land under a Lord was hereditary."

To give the ſtreſs of the Argument, in other words: if the eſtates of Sub-vaſſals had not been deſcendible at the time when this Law was paſſed, it had been needleſs to have ſaid any thing in it of the Lord's reſuming them; for as the Tenant, on that ſuppoſition, held only for life, and by the Law was to die, the Lands in

his tenure would have fallen into the Lord's hands of courſe at his death.

To invalidate this way of reaſoning, an Objection may be raiſed, which it will not be amiſs to obviate: it may be ſaid, that the proviſion in the Law for the Lord's reſumption was not made to exclude the Heir, who at that time had no claim, rear fiefs not being then deſcendible, but to prevent the forfeiture, which otherwiſe would have enſued to the King. To which it may be anſwered, that whether Forfeitures to the Crown were ever in uſe, excepting in the caſe of Treaſon, and whether a crime ſtated in the Law itſelf to be the mere effect of cowardice, without the leaſt ſuggeſtion of Treachery, can be deemed treaſonable, may we think, be doubted; but admitting both theſe points, we may venture to ſay, without pretending to any great ſkill in the nature of Forfeitures, that no man could forfeit more than he had, and of conſequence that, in the caſe before us, ſuppoſing the Delinquent's eſtate to have been only for his life, when the Law had bereft him of that, there was nothing left to be forfeited. If the Eſtate therefore would have been forfeited

to

to the Crown, but for the clauſe in favour of the Lord, it muſt have been by reaſon of that very *Deſcent* in it, which the objection is meant to ſet aſide.

Since the Law therefore, as it at preſent ſtands before us, has ſo much of the Swiſs in it, that it will take on equally with either ſide, according to the inclinations of it's employer, the ſafeſt courſe for our Author had been, either, perceiving that he did not underſtand it, to have left it wholly untouched, or, to have contented himſelf with the prudent concluſion of his brother Baronet of famous memory, "That much might be ſaid on both ſides." For if, according to the proverb, to meddle with edged tools is bad, to venture raſhly in the dark among ſuch as have two edges muſt ſurely be worſe.

For our learned Advocate indeed, who builds ſo much upon the Saxon Laws in general, it is ſomewhat unlucky, that any part of this ſhould have come in his way; eſpecially ſince it is, as he tells us, "ſo talked of among Lawyers"; and of conſequence, if he had occaſion to mention it, his Profeſſion called on him to ſpeak of it with

accuracy. To be miſled, as it will appear he has been, by a faulty tranſlation is his misfortune and not his fault; but to lay before his Readers one part of the Law, which he thinks is for him, and to omit another, which is clearly againſt him, is a method of proceeding for which it is difficult to account. Was this done with deſign? Far be it from us to impute to him any thing ſo diſingenuous. When the whole Law was lying before him, did he content himſelf with reading part of it? this is ſomewhat hard to be credited. The more candid, and we think, truer way of accounting for his miſtake is, to ſuppoſe this fragment of the Law to have occurred to him, not in any collection of the Saxon Laws, but ſomewhere elſe in the courſe of his reading; and that catching at it, as a thing which he conceived made for his purpoſe, he haſtily uſed it, without further inquiry, or at all ſuſpecting that more of the Law might remain behind, which his Author, having no occaſion for it, had not produced. Indeed his want of knowledge in ſome other Laws of Cnute, amounts almoſt to a certainty that he never looked into them; for

had

had he done this with the ſlighteſt degree of attention, it muſt have ſhewn him *beyond contradiction*, that, in the reign of that Prince, contrary to his poſition, the Grants under the Lords were hereditary.

Since we have gone thus far into the ſubject of Rear Fiefs, it may not be amiſs to proceed a little further, and put this matter quite out of doubt.

The 68th of Cnute enjoins *the Lord* to take no more of a perſon's goods, who dies inteſtate, than his right Hereot.

The 69th fixes the Hereots of an Earl, a King's Thane, and an inferior Thane. In the Conqueror's Laws publiſhed in the French Language, and the only ones bearing the name of that Prince, which ſeem to be authentic, the 24th is a tranſlation of this of Cnute, and renders the Medemra Thegna of the Saxon Law by the word Vavaſour[n], which term in the place where it is uſed can have no other ſignification than that of a Rear Vaſſal, for the Hereot, or Relief, as it is there called, is not made payable to the King, as in the caſes of an Earl or Baron, but to the liege Lord.

[n] Wilk. Sax. Law, p. 223.

By the 71ſt, If a Widow within the firſt year of her Widowhood marries again, ſhe forfeits the Dower and Goods, which ſhe had from her firſt Huſband, and the neareſt Friend takes poſſeſſion of them; the new Huſband, in this caſe, forfeiting the value of his head to the King, or to the perſon to whom he hath given his juriſdiction.

The offence here of the ſecond huſband doubtleſs was an illegal intruſion into the Fief of the firſt, and the penalty for it conſequently due to the King, if that Fief was held immediately of him, or to an Earl or King's Thane, if the deceaſed was a rear vaſſal: but the deſcent to the neareſt friend is mentioned indiſcriminately, and was therefore to take place equally in either caſe.

The next Law to be produced, is that of which our Author has only given us a part: when the whole Law is laid before the Reader, tranſlated in ſuch a manner as the original will juſtify, it will be needleſs, ſo far as relates to Rear Fiefs, to add any remarks upon it; every one will ſee, at the firſt view, that our Author's deductions from the former part of it are utterly

utterly inconſiſtent with what follows after in the concluſion.

Law LXXV. of Cnute's Political Laws.

And the man who flees from his Lord, or from his Fellow through cowardice, whether it be in an expedition by ſea or by land, let him loſe all which he has, and his own life; and let the Lord ſeize the Goods, and his Land which he gave him; and, if he has Bookland, let that go into the King's hands. And the man, who in an expedition falls before his Lord, be it on Land or at Sea, let the Hereot be forgiven, and let the Heirs take poſſeſſion of the Land and of the Goods, and make a diviſion of them according to right.

It appearing from theſe Laws not only that Rear-Fiefs at the time when they were enacted were Hereotable, which in itſelf ſeems to imply ſucceſſion, but that actually they did deſcend, and that the mode of ſuch deſcent was ſo well known as to render it unneceſſary for the Legiſlature to give directions about it, we have now done with this ſubject, and ſhall return to the queſtion more directly before us.

This

This 75th of Cnute has for it's objects the two kinds of military ſervice then in uſe, the one of the Vaſſal who followed his Lord, and the other of the Freeman who was led by the Earl, and the officers under him.

The Law thus conſtrued, takes in all the three orders of the ſtate, who were ſubject to military duty; for the word Lord is in this place comprehenſive, and includes the ſovereign Lord, as well as the Nobleſſe; whereas, if Booklands are, according to our Author's Notion of them, conſidered as Fiefs held immediately of the Crown, thoſe and rear fiefs are the only Eſtates mentioned in the Law, and no proviſion is made againſt miſbehaviour in the perſons who poſſeſſed the Free Lands; yet Deſertion of, or daſtardly behaviour in, the ſervice, one ſhould think, was rather to be apprehended from the Freeman than the Feudaliſt, who was not only of a ſuperior rank to the other, but attached beſides to his Leader, by that principle of Honor and Fidelity which bound the Vaſſal to his Lord, and was in thoſe times, of all earthly things, eſteemed the moſt ſacred and inviolable.

Again,

Again, if the poſſeſſor of Bookland held immediately of the Crown, as our Kings in thoſe times generally headed their Vaſſals themſelves, the Law ſurely would rather have ſpoken of one of this kind, who forſook his colors, as deſerting his Sovereign, than his Fellow; for the word, which, to keep as near to the original as we could, is here rendered Fellow, the Gefena of this Law, the Geriþ in the 23d of Ine, the Felagus of the 35th of Edward the Confeſſor, means no more than the Headborough; and though ſuch a perſon preſided in the Field as well as at Home over his Guild, Tything, or Decennary[o], and in ſome caſes, when he was not called out to ſervice, had the care of the Arms belonging to it; how abſurd would it be to ſuppoſe that Thanes of the firſt rank went out to war under ſuch an inferior officer?

Bookland therefore, did not belong to the military tenants of the Crown, for the

[o] Si quis in exercitu—deprædare voluerit—hoc omnino teſtamur ne fiat, et exinde curam habeat comes in ſuo comitatu, Ponet enim ordinationem ſuam ſuper *Centuriones* et *Decanos*, ut unuſquiſque provideat ſuos quos regit, ut contra legem non faciant. Leg. Baiwareorum, Tit. V. cap. 1. Baluzius, Tom. I. p. 103.

the reaſons here given; nor to thoſe of the Lords, for, to the Lands of theſe, it is oppoſed; nor in the laſt place to the Tenants of either, who were not military, for ſuch could not be objects of this Law; it follows therefore of neceſſity, that it muſt have been the property of the Freemen.

To draw now towards a concluſion: ſo far as the analogy of Law, and Nature of the German Conqueſts enabled us to do it, we have before endeavoured to ſhew that Bookland and Freeland were the ſame; which point, from what has now been added in theſe obſervations on the Saxon Laws, being, we apprehend, put beyond a doubt; and it having been to theſe three that our Author made his Appeal; our Argument, we think, might be concluded here, as the Lawyers end their Reports, with an "et ſic per totam curiam"; to leave however nothing untouched which may ſerve to ſtrengthen it, we ſhall now quit the track in which we have hitherto followed our Author: and enter into a new examination of his Doctrine by the criterion of ancient Records.

The

The Will of Duke Alfred [p], who lived in the reign of the great Prince of that name, will be of good uſe to us for this purpoſe: the Duke in it diſpoſes only of his perſonal Eſtate and Booklands, doubtleſs, becauſe in thoſe times no other eſtates would paſs by Will; ſome of thoſe Lands he gives for life only, others for life and to the iſſue, entailing the remainders over on his paternal or maternal heirs for ever, or, as the expreſſion is, for ſo long time as Baptiſm ſhall remain in England; He gives likewiſe rent charges on ſome of them for pious and charitable uſes in perpetuity. Could lands over which a perſon had ſuch power as this be otherwiſe than free? But to go on: I give ſays the Duke, to Athelwalde my ſon three hides of Bookland, two hides in Whaldon, one in Gatton; and give him therewith a hundred ſwine; and, if the King will give him the Folklandes to the Bookland, let him have and enjoy them; if that ſhould not be, then let her (his widow) give him, as ſhe chuſes, either that Land at Horſley, or

[p] At the end of Lye's Saxon Dictionary from Mr. Aſtle's collection.

or that at Lingfield. In another part of his Will, ſpeaking of the perſon who is to ſucceed his daughter in ſome of his Book-land, in caſe of her dying childleſs, he directs his daughter if ſuch her eventually intended ſucceſſor ſhould by good fortune and management obtain *the other Land*, to ſell him that in her poſſeſſion for half it's worth.

Let us now aſk what is to be thought of the Folklands and *Other Land*, which are thus here oppoſed to Bookland? Could they be any other than Benefices held of the Crown by the Duke for life, and reverting to it at his death; but in which as they were very ſuitable companions to his free Eſtates, He wiſhed the perſons for whom theſe were deſtined might, through the Royal favour, be his ſucceſſors?

To paſs on to another ancient Will[q] that of Prince Athelſtan, the eldeſt ſon of Ethelred II. how different is the procedure of this Prince from that of Duke Alfred? Athelſtan, previous to the making of his Will, applying for his father's conſent to the

[q] At the end of Lye's Sax. Dict. from Aſtle's collect: and likewiſe in Somner's Gavel-kind.

the Bequeſts intended in it, receives from him this gracious anſwer, delivered before his Brother Edmund and other reſpectable witneſſes, that "He might, with God's leave and His, beſtow his Honorary or ſtipendiary Land[1] and other ſubſtance, as he thought beſt, either for God, or for the World." Notwithſtanding which general permiſſion, having, after it was received, bequeathed to pious uſes an Eſtate which the King had not given, but only *let*, to him, and which, it is to be preſumed, had not been mentioned in the former meſſage to his father, He immediately in the Will itſelf craves leave that the Bequeſt may ſtand. Alfred did nothing of this kind; but without conſulting any Superior diſpoſed of his Booklands in ſuch a manner as he could not poſſibly have done

[1] His Ape, Honor, Stipendium; in the French Capitularies Fiefs are, for the moſt part, called Honors; which term is ſtill in uſe among us when the greater Fiefs are mentioned, ſuch for inſtance as thoſe of Clare or Richmond. Thus much for the firſt ſenſe of the word, as given us by Lye; in reſpect to the ſecond, almoſt every body knows that Feudal Lands were conſidered as Stipends granted for certain ſervices; an original Grant of this kind now lying before me, is couched in theſe words, "capiendo—proficuum de predictis terris—*pro ſtipendio ſuo.*"

done without licence from the Lord, had they been ſubject to one: Booklands therefore were free, and it only remains to be ſhewn that they were ſuch in name as well as deed, which the following Extracts will render ſufficiently clear.

A Benefactor to the Church of Canterbury ſpeaks of his Donation in theſe terms, "volo autem ut monachi teneant *terram* illam *omnino liberam*, ſicut ego et anteceſſores mei, et nemini inde reſpondeant." A Benefaction to St. Lawrence's Hoſpital in the ſame City is thus deſcribed by the Donor, "Duo Meſſuagia quæ ſita ſunt in terra de *Bocland de qua nulli reſpondeo*[s]." The former of theſe quotations ſhews that Lands for which the owner was reſponſible to no one were intirely Free; the latter, that Booklands were of this kind[t];

Our learned Advocate cannot, we think, withſtand all the evidence, which now lyes

[s] Somner's Gavelkind, p. 120 and 121.

[t] Of the ſame nature with the following; "Quod ſiquidem—eſt allodium noſtrum—de quo nunquam recognoſcendo, vel aliter, *reſpondimus* vel *reſpondere* debemus alicui Domino—Du Cange in voce Alodis, Tom. I. p. 146.

lyes before him; we ſhall therefore take leave of the ſubject, and of Him, with this ſingle piece of advice, for the benefit of Him and his Clients, that for the future, before He ventures to ſpeak in any Cauſe, He ſhould read his Brief.

POSTSCRIPT.

IN our explanation of the 37th of Alfred, we took notice of our Author's dexterity in ridding himſelf from Analogy, when it makes againſt him, and promiſed, that his aſſertion by which he effected this, ſhould be taken into conſideration before we concluded: it is time therefore now for us to acquit ourſelves from this engagement.

"It is certain," ſays the learned Advocate in his Hiſtory of Succeſſion, "the Bookland (meaning thereby the Feudal Land) went, in general, to the Heirs of the immediate Crown-Vaſſals among the Saxons, more early than in any other ſtate in Europe; but at what preciſe time it began to do ſo, or by what ſteps it was

granted to more and more Heirs is impoſſible to ſay; the Engliſh Antiquities are involved in Miſts, and the Scotch in the moſt profound Darkneſs, during the period in which ſuch alterations might be expected to be found."

The Miſts and Darkneſs conſidered in which his ſubject was involved, our author was happy in being able to ſpeak upon it with ſuch *certainty*; but he had done well to have informed us, on what evidence that certainty reſts; for until this appears, there will be too much room to ſuſpect, that it grows entirely out of his former error, which we have juſt been confuting.

The 1ſt Law for the deſcent of Fiefs in France was, as we have long ſince had occaſion to obſerve, in the year 877; the abovementioned Will of Duke Alfred was written in the reign of the King of that name, and before 888, but in what year we cannot preciſely ſay; whenſoever it was executed, it is evident, that Fiefs at the time were only for life; deſcent was not ſo much as thought of; if his Heir ſucceeded him, the Duke ſuppoſed that it muſt be by addreſs and management; theſe

theſe things duly weighed, it is very unlikely that Fiefs became hereditary in the earlier part of Alfred's reign; but for the Deſcent here to have been prior to that in France, it muſt have commenced within the firſt ſix years of this prince, a period, during which, the ravages of the Danes could afford him no leiſure for ſuch an important alteration, which therefore muſt have happened ſomewhat later.

From future reſearches, perhaps it will be found to have taken place under Athelſtan, after two of his Siſters had been diſpoſed of in marriage to Charles the Simple of France, and Otho the Emperor; by which connexions the Engliſh Nobility would, of courſe, become acquainted with the greater privileges, which the Feudal Tenants enjoyed in thoſe courts, than in that of England, and be deſirous of introducing them into their own country.

Whether this conjecture is right, time, and the diligence of future Antiquaries muſt ſhew; but thus much is certain: Fiefs, even among thoſe of the higheſt order, were, from what has been ſaid, not deſcendible at the beginning of Alfred's reign; it has been ſeen that both

theſe and rear-fiefs were ſo before the end of Cnute's. This is a wide period; but the following extracts will enable us to contract it. Edgar, in ſome regulations which he iſſued, touching the conduct of the Monks, has this injunction, "ut nemo Abbatum vel Abbatiſſarum ſibi locellum ad hoc theſaurizaret terrenum, ut *ſolitus Cenſus* quem indigenæ Heriatua *uſualiter vocitant*, *qui* pro hujus patriæ potentibus *poſt obitum Regibus* dari ſolet, unde pro eis ſæcularium imitatione, dari poſſet, haberent — ſi quæ vero priore obeunte, ſuperfuerint, ſubſequens Abbas — non propinquis Carnalibus, vel Tyrranis ſæcularibus — ſed neceſſitatibus Fratrum et Pauperum ſubveniendo — ſapienter diſponat[u]."

u Selden on Eadmer, P. 153.

It is almoſt needleſs to ſay to what end this Extract is produced: it ſhews, at firſt ſight, that in Edgar's reign, Fiefs held of the Crown were not only deſcendible, but *cuſtomarily* ſo.

Of Rear-Fiefs, nothing is ſaid in this Conſtitution of Edgar, but ſo far as Analogy will go, the above-cited Law of Charles the Bald, will inform us how it fared with them.

"If a Count dies, the Law directs that his ſon ſhould ſucceed him in the Government of the County; but if he has no ſon, the Office is then to be diſpoſed of at the King's pleaſure. Then come the directions, touching the Fiefs, "Similiter et de Vaſſallis noſtris faciendum eſt," and the Rear-Fiefs, "Et volumus atque expreſſe jubemus ut tam Epiſcopi quam Abbates et Comites ſeu etiam cæteri fideles noſtri, *hominibus* ſuis ſimiliter conſervare ſtudeant[x]." This, as we have formerly obſerved, is the firſt Law in the Capitularies, by which Deſcent is eſtabliſhed; and we find it commmenced at one and the ſame time in the Counties, Fiefs, and Rear-Fiefs. If the Caſe was the ſame here, as from Analogy we are led to think it was, the time which gave riſe to ſucceſſion in both kinds of Fiefs muſt be ſought far enough back, before 975 the laſt of Edgar, for the practice of paying Hereots or Compoſitions for them to become *uſual* and *cuſtomary* in his reign.

[x] Capit. Baluz. Tom. II. Tit. 153.

We could have wiſhed to have brought the period, in which theſe great alterations

in the Feudal ſyſtem firſt began in this country more nearly to a point, but our Data will carry us no further. We muſt therefore leave it to be done by ſome future, and more fortunate Inquirer.

ERRATA.

Advertiſement, pag. iv. n. †. line 2. next before *calls*, inſert *where He*.

Ib. v. laſt line, for *inquiry*, read *inquiries*.

Diſcourſe, pag. 3. l. 20. for *Freeman*, read *Freemen*.

Ib. pag. 4. l. 16, 24, 28. for *Ideots*, and *Ideot*, read *Idiots*, and *Idiot*.

Ib. pag. 10. l. 11. againſt the word *acknowledges*, add the following marginal reference, *n. Dalrymple of Feud. Prop. Hiſt. of Conveyances, p.* 238. *3d Edit.* and alter the letters of reference from thence forwards till *w* has its turn, which at preſent it has not.

Ib. pag. 17. note *e*. after *age*, in the 4th line, add *Law* 7. *Ine*; and at the end of the next line, after *reign*, add *Law* 1. *Æthelſtan*.

Ib. pag. 23. note *f*. l. 1. between *Priory* and *are*, inſert *lately in my hands*.

Ib. pag. 27. l. 18. for *ſubſtitue*, read *ſubſtitute*.

Ib. pag. 45. l. 19. for *Whaldon*, read *Whatdon*.

Ib. pag. 52. l. 11. " dari ſolet" ſhould have been in Italics.

Ib. l. 15. *Carnalibus* ſhould have been with a little *c*.

For *Tyrranis*, read *Tyrannis*.

Ib. pag. 53. l. 26. between *to* and *become*, inſert *have*.